No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, T'RUAH, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, *Amici Curiae* Anti-Defamation League ("ADL"), Jewish Council for Public Affairs ("JCPA"), Union for Reform Judaism ("URJ"), Central Conference of American Rabbis ("CCAR"), Women of Reform Judaism ("WRJ"), and T'ruah: The Rabbinic Call for Human Rights ("T'ruah") respectfully submit this brief in support of Respondents.

Founded in 1913, ADL is a civil rights and human relations organization that works against bigotry and hate, seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all people. Through its 26 regional offices throughout the United States, ADL provides materials, programs and services to combat anti-Semitism and all forms of bigotry. Because of its history fighting discrimination, including prejudice toward immigrants and religious minorities, ADL can provide unique and important insights for the Court in addressing Proclamation No. 9645 (the "Proclamation") and in considering the historical context of the Proclamation's provisions limiting or barring entry of immigrants into the United States.

JCPA is the coordinating body of 16 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than Amici contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief.

security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society. JCPA recognizes that the United States was founded by individuals who came here in search of religious and political freedom and economic opportunity, and that our country is based upon the ethical imperative to "welcome the stranger." JCPA's policies make every effort to institute uniform, compassionate and humane protocols and criteria to process refugee and asylum claims. JCPA works to ensure that those fleeing persecution are protected, and that the United States is accessible and welcoming toward those who wish to come here to work and live. Since 1990, JCPA has supported an open admissions policy that maintains the pluralistic character of American society and does not prefer one national group at the expense of another. JCPA opposes the use of rigid caps on entry to the United States. Because of its work in this field, JCPA can offer unique and helpful information to this Court related to the harmful impact of the Proclamation on individuals fleeing persecution.

URJ, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and Women of Reform Judaism, representing more than 65,000 women in nearly 500 women's groups around the world, come to this issue out of our affirmation of the supreme value of human life and the equal dignity of every human being. We also share a longstanding commitment to the principle of religious liberty that has lifted up people of all faiths while providing more protections, rights and opportunities than have been known anywhere else throughout history. We are committed to fulfilling the mandate of the Prophets of Israel who

bade us to pursue justice, seek peace, and build a society of loving-kindness among all of G-d's creatures.

T'ruah brings together rabbis and cantors from all streams of Judaism, together with all members of the Jewish community, to act on the Jewish imperative to respect and advance the human rights of all people. We join this amicus brief to express our condemnation of the Proclamation, which effectively closes our borders to Muslims and flagrantly violates America's longstanding, values-driven commitment to serving as a safe haven for immigrants.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States is a nation dedicated to the ideals of equality, liberty and justice. (*See infra* Section I.) Adhering to these principles under changing domestic and international circumstances is a continuous work in progress. Throughout the history of the United States, and frequently with respect to immigration, our ideals have been tested. Sometimes the nation rises to meet the challenge, upholding the values that make America exceptional. (*See infra* Section II.) At other times, when prejudice and fear predominate over reason and compassion, we falter, often with devastating consequences. (*See infra* Section III.) We turned our backs on the *St. Louis*, a ship with nearly 1,000 Jews fleeing Nazi Germany, condemning hundreds of them to their deaths; we passed laws that overtly excluded and discriminated against the Chinese; and we rounded up more than 100,000 Japanese Americans and interned them in prison camps in the 1940s. In each instance, when we later realized that we had strayed from our principles, we were left to apologize to the people who had suffered, or to their descendants, or to the memory of those who

perished without descendants, in each case promising to learn from our mistakes and not to repeat them.

ADL was created at a time when fear and prejudice against Jews were so great that a Jewish man, Leo Frank, was convicted of murder after a trial marked by overt anti-Semitism and then dragged from his prison cell and lynched in 1915.[2] ADL regularly confronts discrimination against perceived outsiders, foreigners and strangers. As an organization founded by immigrants and sworn to protect the interests of religious and ethnic minorities, ADL believes that when our nation's values are threatened, we are duty-bound to return to the founding principles that propelled this nation of immigrants – in the hope that future generations can celebrate and maintain our resolve. Furthermore, JCPA, URJ, CCAR, WRJ, and T'ruah believe that in accordance with our core American principles of equality, fairness and due process of law, those entering the country legally with the intention to settle here permanently should not be subjected to discriminatory administrative procedures.

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[2] *See* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. TIMES, Mar. 8, 1982, http://www.nytimes.com/1982/03/08/us/after-69-years-of-silence-lynching-victim-is-cleared.html. After the lynching, armed mobs ran through the streets of Atlanta, forcing Jewish businesses to shutter their doors and about half of Georgia's Jewish population to flee. Sixty years later, Georgia posthumously pardoned Frank on the grounds that the State failed to protect him while he was in its custody. *See* STATE BOARD OF PARDONS AND PAROLES, Pardon of Leo Frank (Mar. 11, 1986), http://www.gpb.org/files/georgiastories/nsouthfrank176.jpg. *See also* Leonard Dinnerstein, *Leo Frank Case*, NEW GEORGIA ENCYCLOPEDIA, http://www.georgiaencyclopedia.org/articles/history-archaeology/leo-frank-case.

ARGUMENT

With this brief, Amici Curiae provide insight into our country's checkered history with refugees and immigrants to demonstrate that the decision of the Ninth Circuit in *Hawaii v. Trump (Hawaii)* should not be disturbed.[3] These decisions enjoin aspects of the Proclamation, which is the third in a series of Presidential Orders that seeks to bar or restrict entry into the United States by persons from six majority-Muslim nations.

Amici Curiae also seek to show that the Ninth Circuit correctly determined that the public interest lies squarely in support of injunctive relief, as America has always been at its best when it opens its doors to refugees and immigrants.

I. AMERICA'S ASPIRATIONS AS A REFUGE FOR THE OPPRESSED.

The promise of America has been manifest since before the American Revolution. John Winthrop, while still on his transatlantic voyage to the New World, admonished the future colonists of Massachusetts always to remember that their new community would be "as a city upon a hill," with the entire world watching.[4] In fulfilling this vision, the country welcomed in its early years those disfavored and persecuted in their homelands based on their religious beliefs, including the Pilgrims, the Puritans and the Huguenots. Since then, our nation's wisest leaders

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[3] As of the date of this amicus brief, the Court had not yet ruled on the petition in *International Refugee Assistance Project v. Trump* that the Court hear that appeal from the Fourth Circuit together with *Hawaii*.

[4] John Winthrop, *A Model of Christian Charity* (1630).

have been guided by Winthrop's inspiring vision and have strived toward a more inclusive democracy.

The birth of the United States came in part because the Founders sought to cast off the shackles of Europe's endless religious wars and sectarian conflict in order to form a more perfect union. In beseeching the country to separate from England, Thomas Paine recognized that Europe was "too thickly planted with kingdoms to be long at peace" and believed the discovery of America had a divine purpose: "to open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety."[5] Seven months later, the Declaration of Independence enunciated the "self-evident truths" that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Less quoted from the Declaration is the Founders' burning grievance that the English King had restricted free immigration, having "endeavoured to prevent the population of these States; for that reason obstructing the Laws for the Naturalization of Foreigners [and] refusing to pass others to encourage their migrations hither."[6]

After the United States won its independence, it faced the challenge of designing laws that embodied the enlightened vision of the new nation. In 1785, James Madison published "Memorial and Remonstrance Against Religious Assessments" in opposition to a bill proposed to Virginia's General Assembly that would have levied a modest tax to support Christian

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[5] Thomas Paine, *Common Sense* (Jan. 10, 1776).

[6] Declaration of Independence (July 4, 1776).

education.[7] Madison warned that any measure, no matter how slight, that gave a preference to one religion over another would constitute "a dangerous abuse of power" and would betray the vision of America as a shining city upon a hill:

> Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? *Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution.* . . . Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent, may offer a more certain repose from his Troubles.[8]

Virginia recognized Madison's wisdom. It rejected the establishment bill and instead adopted Thomas Jefferson's "Statute for Religious Freedom," which firmly separated church from state and enshrined the

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[7] James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 9 (Jun. 20, 1785).

[8] *Id.* (emphasis added).

principles of religious liberty for all.[9] When Madison went to the Constitutional Convention in 1787, he fought for Jefferson's view to become the law of the land, and it became a bedrock of the rights confirmed by the First Amendment.

Although the makeup of the United States was overwhelmingly Christian at its birth, our Founders were clear that the nation's new laws prohibiting religious discrimination extended to people of all faiths and backgrounds. When Jefferson later reflected on his Statute for Religious Freedom, he extolled the broad application of the law, which was evidence that the legislators "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan [Muslim], the Hindoo [Hindu], and Infidel of every denomination."[10]

The American values of accepting people into this country regardless of their faith, race or nationality have been celebrated by our leaders. In 1855, Abraham Lincoln confronted the burgeoning anti-immigrant "Know Nothing" movement, soundly rejecting the Know Nothings' vision of an America in which "all men are created equal, except negroes, and foreigners, and Catholics."[11] He said of the movement: "When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty – to Russia, for instance, where despotism can be taken pure. . . ."[12]

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[9] Virginia's Statute for Religious Freedom, Va. Code Ann. § 57-1 (West 2018).

[10] Thomas Jefferson, *Autobiography*, Works 1:71 (1821).

[11] Abraham Lincoln, *Letter to Joshua F. Speed* (Aug. 24, 1855), http://abrahamlincolnonline.org/lincoln/speeches/speed.htm.

[12] *Id.*

The vision of the "shining city upon a hill" has also inspired poets. In 1855, Walt Whitman wrote: "These States are the amplest poem, here is not merely a nation but a teeming Nation of nations."[13] Emma Lazarus's immortal sonnet, enshrined on the pedestal of the Statue of Liberty, urges "ancient lands" to give America "your tired, your poor, your huddled masses yearning to breathe free. . . . Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"[14]

These values have endured to the modern day. In his 1959 book, *A Nation of Immigrants*, future President John F. Kennedy studied the history of immigration in this country, both in terms of those subject to religious persecution and those facing other overpowering hardship. He wrote: "America has always been a refuge from tyranny. As a nation conceived in liberty, it has held out to the world the promise of respect for the rights of man."[15]

On the eve of his election as President in 1980, Ronald Reagan also took inspiration from Winthrop's vision of America:

> These visitors to that city on the Potomac do not come as white or black, red or yellow; they are not Jews or Christians; conservatives or liberals; or Democrats or Republicans. They are Americans awed by what has gone before,

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[13] Walt Whitman, *Preface to Leaves of Grass* (1855).

[14] Emma Lazarus, *The New Colossus* (1883).

[15] John F. Kennedy, *A Nation of Immigrants* 7 (Harper Perennial, January 2008).

proud of what for them is still . . . a shining city on a hill.[16]

II. AMERICA IS AT ITS BEST WHEN IT HONORS ITS COMMITMENT TO ITS CORE VALUES.

There are numerous examples where the United States has met its aspirations as Winthrop's "shining city upon a hill," opening itself to "anyone with the will and the heart to get here."[17] At its best, the United States has been a beacon of hope for refugees from war-torn countries, victims of religious persecution, natural disasters or other emergencies, fulfilling what President Kennedy described in *A Nation of Immigrants* as the "natural humanitarian impulses of the American people which is in keeping with our traditions of shelter to the homeless and refuge for the oppressed."[18] Indeed, many of these refugees have contributed immeasurably to the fabric of America.

With the Truman Directive in 1945, and the Displaced Persons Act of 1948, the United States—for the first time since its founding—began explicitly to seek to become a sanctuary for those fleeing persecution, as the first Americans had done hundreds of years earlier.[19] President Truman led the assistance

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[16] Ronald Reagan, *Election Eve Address*, Nov. 3, 1980, http://www.presidency.ucsb.edu/ws/?pid=85199.

[17] Ronald Reagan, *Farewell Address to the Nation* (Jan. 11, 1989), http://www.presidency.ucsb.edu/ws/?pid=29650.

[18] Kennedy, *supra* note 15 at 46.

[19] David W. Haines, "Learning From our Past: The Refugee Experience in the United States," AMERICAN IMMIGRATION COUNCIL, Nov. 25, 2015, http://www.americanimmigrationcouncil.org/research/refugee-experience-united-states.

and reconstruction effort to resettle hundreds of thousands of European Jews and others displaced from their home countries who could not return after World War II.[20]

These new laws gave truth to Thomas Paine's prophecy that the United States would "open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety." The refugees welcomed to the United States during or after World War II have made immeasurable contributions to politics, science, literature, music, art, and social and scientific studies. Refugees from that period include Madeleine Albright, Hannah Arendt, Bela Bartok, Marc Chagall, Marlene Dietrich, Albert Einstein, Enrico Fermi, Henry Kissinger, Raphael Lemkin, Thomas Mann, Vladimir Nabokov, Claude Levi-Strauss, Dr. Ruth Westheimer, and Billy Wilder. American culture and science stand on the shoulders of many of these contributions.

With the onset of the Cold War, Congress began assisting groups of refugees from Communist regimes including those seeking freedom from the Soviet Union, Cuba, Hungary, Poland, and Yugoslavia, as well as those fleeing Southeast Asia after the Vietnam War. The openness to asylum seekers reflected in these efforts also demonstrated a growing recognition that many refugees have significant education, skills, strong family structures and commitment to hard

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[20] *Id.* In so doing, as set forth below, the United States began the process of making amends for the tragic consequences of its turning away Jewish refugees during World War II, dooming many of them to death or excruciating years in concentration camps.

work and success that make them ideal new citizens.[21] Examples of notable refugees that came to the United States from this period include: Sergey Brin, Joseph Brodsky, Gloria Estefan, Milos Forman, Wyclef Jean, Miriam Makeba, Thomas Peterffy, Regina Spektor and David Tran.

In the wake of the publication of *A Nation of Immigrants*, Congress enacted the 1965 amendments to the Immigration and Nationality Act ("INA"),[22] which abolished the national origins quota system that explicitly sought to maintain a certain "ethnic balance of the American population." As part of the legislative history of the INA, the House of Representatives quoted President Lyndon B. Johnson's description of the incalculable harm this discriminatory quota system had caused our nation:

> Over the years the ancestors of all of us – some 42 million human beings – have migrated to these shores. The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities. . . . Violation of this tradition by the national origins quota system does incalculable harm. The procedures imply that men and women from some countries are, just because of where they come from, more desirable citizens than others. We have no right to disparage the ancestors of millions of our fellow Americans in this way.[23]

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[21] *Id.*

[22] 8 U.S.C. § 1152.

[23] H. Rep. No 89-745 (1965).

In his remarks upon signing these amendments into law, President Johnson further remarked that the amendments "correct[] a cruel and enduring wrong on the conduct of the American Nation" and "make us truer to ourselves both as a country and as a people."[24] As the Ninth Circuit stated in *Hawaii*, the amendments to the INA manifested Congressional intent "to repudiate a history of nationality and race-based discrimination in United States immigration policy."[25]

Congress subsequently ratified other important measures that reinforced our nation's commitment to refugees and immigrants. In 1968, the United States was one of the first countries to sign the United Nations Protocol Relating to the Status of Refugees, a key treaty in international refugee law.[26] The 1974 Jackson-Vanik Amendment ultimately permitted approximately 500,000 Jews, evangelical Christians and Catholics to escape religious persecution in the former Soviet Union by coming to the United States.[27] And in 1980, Congress signed the Refugee Act, which standardized the resettlement process and services for all refugees admitted to the United States.[28]

Since the 1980s, the United States has resettled refugees from Darfur fleeing genocide and violence;

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[24] Lyndon B. Johnson, *Remarks on signing the Immigration and Nationality Act of 1965* (October 3, 1965), http://www.presidency.ucsb.edu/ws/index.php?pid=27292.

[25] 878 F.3d 662, 695 (9th Cir. 2017).

[26] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967, for the United States, Nov. 1, 1968).

[27] Jackson-Vanik Amendment, 19 U.S.C. § 2432 (1974).

[28] Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

refugees from Bhutan forced out of their country; and Syrian, Iraqi and Afghan refugees displaced by war. In addition, the U.S. has facilitated the naturalization of Hmong veteran refugees who served in Laos in support of U.S. forces and during the Vietnam War;[29] assisted the children of Vietnamese re-education camp survivors through the "McCain Amendment;" assisted former Soviet and Indochinese nationals with a credible fear of persecution through the "Lautenberg Amendment;" and assisted Iranian religious minorities through the "Specter Amendment."[30] Since 1975, the U.S. has settled more than 3 million refugees.[31]

It should come as no surprise, then, that more than 40 percent of Fortune 500 companies were founded by recent immigrants or their children (even though such immigrants account for roughly 10.5 percent of the U.S. population); or that the revenue generated by these companies is greater than the GDP of every country in the world outside the U.S. except China and Japan; or that successful global companies founded by American immigrants and refugees or their children span all sectors of the economy, including some of the most valuable brands in the world (Apple, Google, eBay, AT&T, General Electric, IBM, McDonald's).[32]

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[29] William J. Clinton, *Statement on Signing the Hmong Veterans Naturalization Act of 2000* (May 26, 2000), http://www.presidency.ucsb.edu/ws/index.php?pid=58559..

[30] Andorra Bruno, CONG. RESEARCH SERV., RL31269, "Refugee Admissions and Resettlement Policy" (Nov. 7, 2017).

[31] Ruth Igielnick and Jens Manuel Krogstad, "Where Refugees to the U.S. Come From," PEW RESEARCH CENTER, (Feb. 3, 2017), http://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/.

[32] P'SHIP FOR THE NEW AMERICAN ECONOMY, "The 'New American' Fortune 500," (June 2011), http://www.renewoureconomy.

At least 18 percent of all scientists living in the U.S. are immigrants or refugees,[33] and over 25 percent of all physicians and surgeons in the United States are born abroad.[34] And as of 2016, roughly 2 million veterans of the U.S. Armed Forces living in the U.S. – of a total 18.8 million – are refugees/immigrants or have refugee/immigrant parents.[35] As President Kennedy observed, "[t]here is no part of our nation that has not been touched by our immigrant background."[36]

Under these circumstances, it is perverse that the Proclamation purports to rely upon the INA as the justification for its provisions *excluding* immigrants on the basis of nationality. Far from making the United States "truer to ourselves both as a country and as a people," the Proclamation betrays the legislative intent of the 1965 amendments to the INA.[37] (This

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org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf.

[33] Flora Lan, Katherine Hale, and Emilda Rivers, "Immigrants' Growing Presence in the U.S. Science and Engineering Workforce: Education and Employment Characteristics in 2013," NATIONAL CENTER FOR SCIENCE AND ENG'G STATISTICS (Sept. 2015), https://www.nsf.gov/statistics/2015/nsf15328/nsf15328.pdf.

[34] Nicole Fisher, "25% of Physicians Are Born Outside the U.S. Can Immigration Reform Fix The Shortage?" FORBES: PHARMA & HEALTHCARE (Jul. 12, 2016), http://www.forbes.com/sites/nicolefisher/2016/07/12/25-of-docs-are-born-outside-of-the-u-s-can-immigration-reform-solve-our-doc-shortage/#446de1bc702b.

[35] Jie Song and Jeanne Batalova, "Immigrant Veterans in the United States," MIGRATION POLICY INST. (Oct. 13, 2016), http://www.migrationpolicy.org/article/immigrant-veterans-united-states.

[36] Kennedy, *supra* note 15, at 3.

[37] The Government relies on Section 1182(f) of the INA to argue that the President may restrict the entry of immigrants based

betrayal of America's aspirations is also strikingly demonstrated by the recent decision of the United States Citizenship and Immigration Services to eliminate altogether the reference to "secur[ing] America's promise as a nation of immigrants" in the organization's mission statement.[38]) Further, the Proclamation would exclude on discriminatory grounds the talents, ideas and work ethic of immigrants who, just as with generations past, would help build and protect our nation and strengthen our economy. The *Hawaii* court recognized these contributions in finding that, "because the Proclamation bans the entry of potential entrepreneurs, inventers, and innovators," it is against the public's interest.[39]

III. WHEN AMERICA CLOSED ITS DOORS AND ALLOWED ITS CORE VALUES TO BE COMPROMISED, THE COUNTRY LATER LOOKED BACK IN SHAME.

In sharp contrast to the times when the United States has shown its "natural humanitarian impulses,"

.n national origin alone. *See* 8 U.S.C. § 1182(f). Canons of statutory interpretation, however, instruct that courts must interpret the INA "as a symmetrical and coherent regulatory scheme" and that a provision enacted later in time governs one enacted earlier. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotes omitted). The Ninth Circuit properly held that Section 1152(a)'s discrimination ban, which was enacted more than a decade after Section 1182(f), "provides a specific anti-discrimination bar to the President's general Section 1182(f) powers." 878 F.3d at 696.

[38] *See* Miriam Jordan, "Is America a Nation of Immigrants? Immigration Agency Says No," N.Y. TIMES, Feb 23, 2018, https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html.

[39] 878 F.3d at 700.

there have been times when the country has closed itself off and succumbed to fear or bigotry, with tragic consequences. Sometimes the victims of this xenophobia and prejudice were Jews (the *St. Louis* tragedy and the denial of visas) or other religious minorities, sometimes they were from nations that were regarded as undesirable (the Chinese exclusion) and sometimes they were groups the government assumed to be disloyal (the Japanese internment during World War II). In each case, the United States apologized years later, after it was too late.

A. The *St. Louis* and Jewish Refugees During the Holocaust

The tragedy of the vessel *St. Louis* illustrates the devastating consequences that can result when the United States turns its back on refugees in need. In May 1939, on the eve of World War II and after *Kristallnacht*,[40] the *St. Louis* left Hamburg, Germany, carrying 937 passengers, nearly all of whom were Jews fleeing Nazi persecution. The ship was headed to Havana, Cuba with the hope of having its passengers granted sanctuary in the United States.

Prior to the ship's departure, most of the Jewish passengers had obtained valid paperwork permitting their entry to Cuba and had also applied for U.S. visas, planning to stay in Cuba only until their entry to the U.S. was approved. By the time the *St. Louis* arrived in Cuba on May 27, 1939, however, the Cuban

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[40] *Kristallnacht*, or the "Night of Broken Glass," occurred in November 1938, when almost 100 Jews were murdered, countless more were attacked, and as many as 30,000 Jewish men were arrested and sent to concentration camps. *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEMORIAL MUSEUM, "Kristallnacht," https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201.

president had invalidated most of the passengers' travel certificates.[41] While United States-based Jewish organizations negotiated with Cuban officials to persuade them to admit the other passengers, the United States refused to intercede formally on the refugees' behalf or publicly pressure the Cuban government to admit them.[42]

After negotiations with Cuba failed, the *St. Louis* headed towards Miami in June 1939, coming within sight of the Florida coastline. Despite pleas from passengers on board, President Roosevelt and the State Department refused to accept the Jewish refugees into the United States,[43] reflecting anti-immigrant and anti-Semitic sentiments prevailing at the time.[44] A State Department telegram to a passenger on the ship

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[41] HOLOCAUST ENCYCLOPEDIA, U.S HOLOCAUST MEMORIAL MUSEUM, "Voyage of the St. Louis," https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267.

[42] *Id. See also* Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX Jan. 27, 2017 http://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust.

[43] Kristine Guerra, *What the U.S. Learned from Turning Away Refugees who Fled the Nazis*, WASH. POST, Jan. 29, 2017 https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/what-the-u-s-learned-from-turning-away-refugees-who-fled-the-nazis/?utm_term=.e91085b6c047.

[44] A Gallup poll taken in January 1939 asked Americans if the government should allow 10,000 refugee children, mostly Jewish, from Germany to be taken care of in American homes; 61 percent were opposed. *See* Ishaan Tharoor, *What Americans Thought of Jewish Refugees on the Eve of World War II*, WASH. POST, Nov. 17, 2015 https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii/?utm_term=.a67eb4b68817.

explained the government's position that the passengers must "await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States."[45]

Ultimately, the United States refused entry to the passengers of the *St. Louis*, forcing it to sail back to Europe, as this archival photograph shows:[46]

Historians estimate that more than a quarter of the *St. Louis* passengers – 254 people – were killed in the Holocaust, including a number at Auschwitz, after

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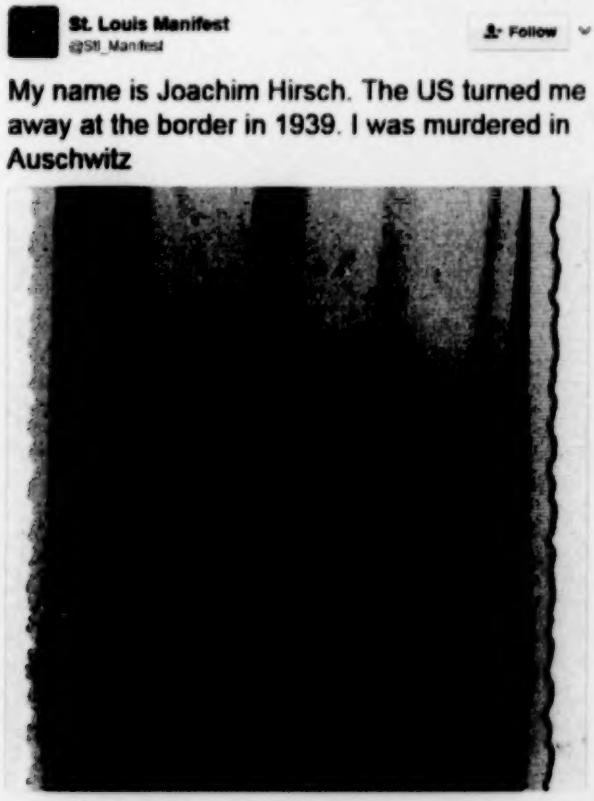
[45] *See* "Voyage of the St. Louis," *supra* note 41.

[46] *See* Lind, *supra* note 42. Recent images of refugee-seekers being sent back to the countries they fled recall the *St. Louis* passengers who were turned away within sight of U.S. sanctuary.

being refused entry to the U.S.[47] On Holocaust Remembrance Day, January 27, 2017, a Twitter account (@Stl_Manifest, accessible at https://twitter.com/stl_manifest), shared passengers' stories, including:


St. Louis Manifest
@Stl_Manifest
Follow
My name is Joachim Hirsch. The US turned me away at the border in 1939. I was murdered in Auschwitz

In April 2009, at a commemoration for Yom HaShoah (Holocaust Remembrance Day) at the U.S. Capitol attended by the President and members of Congress, Fred S. Zeidman, chairman of the U.S. Holocaust Memorial Council, recalled the "infamous ship called the *St. Louis*" and reminded those gathered

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[47] *See* "Voyage of the St. Louis," *supra* note 41.

of the "shameful result" and the consequences of inaction.[48] Three years later, the United States government issued a formal apology for the country's refusal to provide refuge for the Jewish passengers aboard the *St. Louis*.[49] Addressing the 14 surviving passengers, a State Department official stated: "To the survivors of the *MS St. Louis*, on behalf of the president and Secretary of State, I am honored to say what we should've said so long ago, welcome."[50]

The passengers of the *St. Louis* were not the only victims of America's refusal to grant visas to Jews and other minorities during the Holocaust. Before the *St. Louis* sailed, Congress rejected a bill that would have allowed 20,000 imperiled German children to settle in this country. Opponents took an "America-First" approach to reject the proposal, arguing that America should first focus on its own needy and homeless citizens. The wife of the United States immigration commissioner, Laura Delano Houghteling, refused to be swayed by the children's vulnerability, testifying that "20,000 charming children would all too soon grow into 20,000 ugly adults."[51] Countless Jews denied visas to enter the United States ultimately perished in Nazi concentration camps, including the

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[48] Fred Zeidman, Chairman, U.S. Holocaust Memorial Council, Remarks at Days of Remembrance Commemoration (Apr. 23, 2009), https://www.ushmm.org/remember/days-of-remembrance/past-days-of-remembrance/2009-days-of-remembrance/remarks-by-fred-zeidman.

[49] Kamrel Eppinger, *State Department apologizes to Jewish refugees*, SCRIPPS HOWARD FOUNDATION WIRE (Sep. 26, 2012), http://www.shfwire.com/state-department-apologizes-jewish-refugees/.

[50] *Id.*

[51] *See* Lind, *supra* note 42.

Dutch teenager Anne Frank.[52] Historian Richard Breitman reminds us that if not for an immigration policy steeped in fear, an elderly Anne Frank could still be living in the United States today.[53] Instead she was murdered at Bergen-Belsen, made immortal by the teenage diary that survived her. The Proclamation ignores the tragic lessons our nation learned from turning our back on Jewish refugees during World War II, and would again close America's doors to some of the world's most vulnerable immigrants.

B. The Chinese Exclusion

In the late 1860s and early 1870s, Chinese immigrants, including both skilled and unskilled laborers, enjoyed easy passage to this country under the terms

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[52] In 1938, Otto Frank first applied for immigrant visas for himself, his wife Edith, and their two daughters Margot and Anne. *See* Richard Breitman, *Blocked by National Security Fears?: The Frank Family and Shifts in American Refugee Policy, 1938-1941*, YIVO INSTITUTE FOR JEWISH RESEARCH (Feb. 14, 2007), https://www.yivo.org/cimages/richardbreitman-ottofrank-whitepaper.pdf?c=. The family was placed on a waiting list, which by 1939 had grown to 300,000. *Id.* at 2. Despite having multiple people willing to provide affidavits for the Frank family, Otto faced impediments including the quota on German refugees, the requirement of proof of booked transportation to the U.S. and verification that no close relatives remained in German territories. *Id.* at 5. Ultimately, the Frank family was denied refugee status, and Anne, along with her mother and sister, all died in the concentration camps.

[53] Elahe Izadi, *Anne Frank and her family were also denied entry as refugees to the U.S.*, WASH. POST, Nov. 24, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/11/24/anne-frank-and-her-family-were-also-denied-entry-as-refugees-to-the-u-s/?utm_term=.6e028f50e0dd.

of a treaty between the United States and China.[54] Even so, annual Chinese immigration never exceeded 40,000 people, and in 1890 there were only 107,000 Chinese nationals living in the United States.[55] Nevertheless, hostility towards the Chinese escalated within certain segments of the American public, who blamed wage decreases and other economic difficulties on Chinese labor.[56] Although Government leaders initially resisted constituent pressure to stop Chinese immigration,[57] a "campaign of organized violence against Chinese communities took form, and the hysteria led to public pressure too violent to be resisted."[58]

The Chinese Exclusion Act of 1882, signed into law by President Arthur, was the "first federal law ever passed excluding a group of immigrants solely on the basis of race or nationality."[59] The thrust of the Chinese Exclusion Act was that it barred Chinese laborers from entering the United States for 10 years,[60] but it also put in place other discriminatory systems, including a registry for all Chinese who were

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[54] *See* H.R. Res. 683, 114th Cong. (as passed by House, June 18, 2012). *See also* Kennedy, *supra* note 15 at 40.

[55] Kennedy, *supra* note 15 at 40.

[56] HARVARD UNIVERSITY LIBRARY OPEN COLLECTIONS PROGRAM, *Chinese Exclusion Act (1882)*, http://ocp.hul.harvard.edu/immigration/exclusion.html.

[57] President Arthur initially vetoed the bill, which he viewed as incompatible with the Burlingame Treaty. *See* Chester A. Arthur, "Veto of the Chinese Exclusion Act" (Apr. 4, 1882).

[58] Kennedy, *supra* note 15 at 41.

[59] S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[60] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (hereinafter "Chinese Exclusion Act.").

then legally present in the United States.[61] Additionally, if Chinese laborers already in the country wished to leave temporarily, they had to obtain a "certificate" permitting them to return.[62] The Act also prohibited all courts from naturalizing people of Chinese origin, regardless of whether they were legally in this country.[63] These sweeping restrictions were explained only by this statement in the law's preamble: "in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof[.]"[64]

The Chinese Exclusion Act was the first of a series of laws designed to exclude the Chinese from the United States, both physically and politically. The Scott Act of 1888[65] precluded Chinese laborers from leaving and reentering the United States entirely and cancelled all "certificates" previously issued under the Exclusion Act.[66] This cancellation prevented the return of approximately 20,000 Chinese who had lawfully-obtained certificates permitting them to reenter.[67] It also froze the migration of an additional 600 Chinese who were *en route* to the United States at the time of its enactment.[68] When the Chinese Exclusion

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[61] *Id.*

[62] *Id. See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014)

[63] Chinese Exclusion Act, § 14. *See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[64] Chinese Exclusion Act, preamble.

[65] The Scott Act, ch. 1064, 22 Stat. 504 (1888) (repealed 1943).

[66] S. Res. 201, 112th Cong. (as passed by Senate, Oct. 6, 2011). *See also* H.R. Res. 683, 114th Cong.

[67] S. Res. 201, 112th Cong.

[68] *Id.*

Act was set to expire in 1892, Congress passed the Geary Act,[69] which extended Chinese exclusion for another 10 years and introduced additional restrictions.[70] It was not until 1943 that Congress finally began repealing certain – and eventually all – of these discriminatory laws.[71]

The repeal of the Chinese exclusionary laws was a first step in re-establishing the ideals of the Founders. In October 2011, the United States Senate finally issued an apology for the Chinese Exclusion Act and other laws.[72] A similar report was announced by the United States House of Representatives[73] and, later, by the California State Legislature.[74] In each instance, the government noted that the Chinese Exclusion Act and its companion laws were "incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal[.]"[75] The announcements expressed a commit-

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[69] The Geary Act, ch. 60, 27 Stat. 525 (1892) (repealed 1943).

[70] S. Res. 201, 112th Cong.

[71] *Id.*

[72] *Id.*

[73] H.R. Res. 683, 114th Cong.

[74] S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[75] S. Res. 201, 112th Cong. *See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014) (pointing out that, "[p]aradoxically, the very same year that the Chinese Exclusion Act was passed, financing abroad was completed for the Statute of Liberty. . . . While the Statute of Liberty was being built, legislators were contradicting those very ideals by discriminating against Chinese immigrants and lobbying Congress to do the same").

ment to "diversity in the United States that contributes to the country's economic, cultural, technological, academic, and political growth[.]"[76]

> In its apology, the California legislature observed:
>
> The Chinese Exclusion Act set the precedent for racist foreign and national policy that led to broader exclusion laws and fostered an environment of racism that quickly led to the Jim Crow laws of the 1880s, and further segregation legislation that would tear our nation apart through most of the 20th Century[.][77]

Simply put, our nation's leaders recognized that racism breeds racism, and any governmental policies that conflict with the founding ideals of this country cannot be allowed to stand. The Proclamation is such a policy.

C. The Japanese Internment

The internment of Japanese-Americans was authorized by Executive Order 9066,[78] which President Roosevelt issued in early 1942, 10 weeks after the Pearl Harbor attack. Executive Order 9066 gave to the Secretary of War and the military commanders to whom he delegated authority, the power to exclude any and all persons, citizens and aliens from designated areas in order to provide security against sabotage and espionage.[79] Executive Order 9066 makes no

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[76] S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

[77] *Id.*

[78] 7 Fed. Reg. 1407 (Feb. 19, 1942).

[79] *Id.*

reference to the Japanese, just as the Proclamation does not expressly reference Muslims. However, within a week of the issuance of the order, Lt. General John L. DeWitt issued the first of 108 relocation orders resulting in the forcible evacuation of approximately 120,000 Japanese Americans, including 70,000 citizens, to internment camps in desolate areas of the United States for the duration of World War II.[80]

The justification for Executive Order 9066 was "military necessity."[81] However, Congress has since acknowledged that "these actions were carried out without adequate security reasons and . . . were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[82] This conclusion was bolstered by the absence of any effort to invoke Executive Order 9066 to intern German Americans or Italian Americans.[83]

In 1976, President Gerald Ford issued a proclamation acknowledging that "not only was that evacuation wrong, but Japanese Americans were and are loyal Americans." In 1982, the Commission on Wartime Relocation and Internment of Civilians issued a report

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[80] *See* Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II*, 33, 104 (1972).

[81] U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, REPORT: PERSONAL JUSTICE DENIED at 6-8 (96th Cong.) (1982).

[82] 50 U.S.C. § 4202. Anti-Japanese bias was palpable: polls taken in 1944 indicated that more than 60 percent of Americans thought that whites should be prioritized in hiring decisions over Japanese Americans. Stephen White, *Many Americans Support Trump's Immigration Order; Many Americans Backed Japanese Internment Camps, Too*, WASH. POST, Feb. 2, 2017.

[83] *See* U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 71 at 3.

entitled, "Personal Justice Denied." The report set the stage for President Ronald Reagan's historic signing in 1988 of the Civil Liberties Act, which offered a formal apology and reparations for the "grave injustice" of evacuating, relocating and interning Japanese Americans.[84] In his remarks on signing the Act, President Reagan made clear that the internment of Japanese Americans was a "grave wrong."[85] Congress too acknowledged that this measure – carried out under the false banner of "national security" – amounted to a "fundamental violation[] of the basic civil liberties and constitutional rights of [] individuals of Japanese ancestry" and caused "enormous damages, both material and intangible, . . . which resulted in significant human suffering[.]"[86]

Like Executive Order 9066, the Proclamation invokes national security as its justification. Leaving aside the legal standards regarding how much deference such an invocation deserves, the history of the Japanese internment counsels that we must take an especially hard look at actions that undermine core values and freedoms in the name of national security. The Ninth Circuit's *Hawaii* decision correctly reflected this analysis, noting that the "Proclamation makes no finding whatsoever that foreign nationals' nationality alone renders entry of this broad class of individuals a heightened security risk to the United States. Nor does it contain a finding that the nationality of the covered individuals alone renders thei ntry into the

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[84] *See* 50 U.S.C. § 4201 *et seq.*

[85] Ronald Reagan, *Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians* (Aug. 10, 1988), http://www.presidency.ucsb.edu/ws/?pid=36240.

[86] 50 U.S.C. § 4202.

United States on certain forms of visas detrimental to the interests of the United States."[87] Earlier courts that dealt with the original Executive Orders issued by the President in 2017 similarly found that the Orders were rooted in national original discrimination.[88] Nor can courts close their eyes to the Proclamation's focus on majority-Muslim nations. As the Fourth Circuit stated in *IRAP*, the evidence of an intent to disfavor Muslims is palpable. "Plaintiffs here do not just plausibly allege with particularity that the Proclamation's purpose is driven by anti-Muslim bias, they offer undisputed evidence of such bias: the words of the President."[89] The *IRAP* court appropriately concluded that: "On a fundamental level, the Proclamation second-guesses our nation's dedication to religious freedom and tolerance."[90]

CONCLUSION

ADL, JCPA, URJ, CCAR, WRJ, and T'ruah believe that the Ninth Circuit's decision in *Hawaii* to enjoin Sections 2(a), (b), (c), (e), (g) and (h) of the Proclamation are consistent with the principles underlying the Constitution. The Ninth Circuit correctly determined that, absent injunctive relief, there will almost certainly be irreparable harm to countless people, just as there was when the United States turned away the desperate passengers of the *St. Louis*,

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[87] 878 F.3d at 693.

[88] *See Hawaii v. Trump*, 859 F.3d 741, 777 (9th Cir. 2017) ("We cannot blind ourselves to the fact that, for nationals of the six designated countries, EO2 is effectively a ban on the issuance of immigrant visas . . . If allowed to stand, EO2 would bar issuance of visas based on nationality in violation of [the INA]").

[89] 883 F.3d 233, 264 (4th Cir. 2018).

[90] *Id.* at 272.

excluded immigrants from China and interned Japanese Americans. Just as in all these situations, an apology years later is woefully insufficient to address the damage done. Even worse, the Government now justifies the Proclamation based on laws that were enacted for the purpose of reinforcing our nation's commitment to immigrants and of correcting what President Johnson described as "a cruel and enduring wrong on the conduct of the American Nation." Amici Curiae believe that enforcing the Proclamation risks once again sacrificing the nation's core values in favor of prejudice and fear—a sacrifice that history has repeatedly proven has profound consequences both to the persons targeted by the Proclamation and to our still-vibrant vision of the shining city upon a hill.

Respectfully submitted,

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